IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 599 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYKAY ASSOCIATES

Versus

ISHWAR BHUVAN HOTELS LIMITED

Appearance:

MR BS PATEL for Petitioner No. 1

MR MTM HAKIM for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2-3

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 22/11/2002

CAV JUDGEMENT

The present Civil Revision Application is filed against order passed by the learned 2nd Joint Civil Judge (JD) at Vadodara below application Exh. 11 in Regular Civil Suit No. 1360 of 1999 on 5th May 2001.

2. The brief facts, giving rise to the present petition, are as under:

The respondent No.1 herein who is the

original-plaintiff in the suit wanted to construct a hotel in the name and style of Hotel Rivera at Vadodara and for that purpose he had appointed the respondent No.3 herein who is the defendant No.2 in the suit as Architect Consultant. In pursuance of the authority conferred by the respondent No.1 to the respondent No.3, the respondent No.3 engaged the petitioner who is the defendant No.3 in the suit for construction of the hotel project at Vadodara, that is for supervision work by an order dated April 8, 1987. It is stated in the petition that the petitioner had been appointed on behalf of the respondent No.1 by the respondents No. 2 and 3. The petitioner has accepted the said appointment and it was also approved by the respondent No.1. The petitioner started to execute the work as per the order and thereafter certain disputes arose between the parties. It was stated in the petition that as per Clause 9 of the Work Order dated April 8, 1987 given by the respondents No. 1 and 2 there was an arbitration clause and Architect was the Sole Arbitrator.

3. It was further stated in the petition that the dispute arose between the petitioner on the one side and the respondent No.1 on the other side, which according to the arbitration clause has been referred to the respondent No.3 as Architect. The respondent No.3 was therefore seized with the matter as the Arbitrator. However, to the utter surprise of the petitioner as well as the respondents No. 2 and 3, the respondent No.1 filed a Regular Civil Suit No. 1360/1999 in the Court of ld. Civil Judge (SD) at Vadodara for a declaration to the effect that the respondents No. 2 and 3 are not entitled to act as an Arbitrator for any dispute raised by the petitioner against the respondent No.1 and the respondents No. 2 and 3 have not been chosen as Arbitrator by the respondent No.1 and also for permanent injunction restraining the respondent No.3 from proceeding with the arbitration proceedings.

4. The petitioner has further submitted in the petition that the petitioner appeared and filed application at Exh. 11 contending that the ld. Civil Judge has got no jurisdiction to deal with the matter and also contended that in view of the provisions contained in Section 16 of the Arbitration and Conciliation Act, 1996 the Civil Court has got no jurisdiction and application had been submitted to decide the preliminary issue and to dismiss the suit filed by the respondent No.1.

5. It is further submitted by the petitioner that

the hearing of the application at Exh. 11 was taken place and arguments were advanced on behalf of the petitioner on 4.10.2000 whereas the arguments were canvassed on behalf of the respondent No.1 on 2.12.2000. However, the order was passed on 5.5.2001 by the ld. trial Judge dismissing the application at Exh. 11 filed by the petitioner. It is further pointed out that though the application was rejected, in the Rojnama it has been mentioned that the application submitted by the petitioner at Exh. 11 is allowed. It is therefore submitted that the entire order was passed without considering the rival contentions and also without properly appreciating the evidence on record. The petitioner was therefore constrained to file the present Civil Revision Application challenging the impugned order in this revision application.

6. Mr. BS Patel, ld. advocate appearing for the petitioner submits that the ld. trial Judge has committed a very serious jurisdictional error in rejecting the petitioner's application at Exh. 11. He has further submitted that the impugned order is contrary to the law laid down by this Court in the case of Western Shipbreaking Corporation vs. Clare Haven Ltd. - 1997 (2) GLH 565, wherein it is held that the jurisdiction as per the definition of the "Court" under the Arbitration and Conciliation Act, 1996 , is the Court having original jurisdiction. In the present case, the original-court is the District Court at Vadodara and not the Court of ld. Civil Judge. Mr. Patel has further submitted that the prayer made in the suit was under the domain of "Arbitrator" which means under Section 16 of the Act and the Civil Court has got no jurisdiction to grant the said prayer. Mr. Patel has further submitted that the ld. trial Judge has passed the impugned order without any application of mind as it has been mentioned in the order that the respondent No.2 has tried to bring real facts on record while the proceedings clearly revealed that the respondents No.2 and 3 have not appeared at all. Mr. Patel has further submitted that the ld. trial Judge has not considered the appointment letter/work order produced by the petitioner at Mark 39/1 and has grievously erred in observing that it was not signed by the respondent No.1 and there was no clause of arbitration, while under Clause 9 of the work order there is a specific clause of arbitration. As a matter of fact, the respondent No.1 himself has put his signature on the agreement by making an endorsement "approved". On this count also the impugned order is passed without any application of mind. Mr. Patel has further submitted that the respondents No. 2 and 3 were acting on behalf of the respondent No.1 and

though the petitioner was appointed by the respondent No.3 for all practical purposes it can be said that the petitioner was appointed by the respondent No.1 as the respondents No. 2 and 3 are acting as agents of the respondent No.1.

7. In support of his submissions, Mr. Patel has relied on the decision of the Hon'ble Supreme Court in the case of A.M. Mair and Co., vs. Gordhandas Sagarmull - AIR 1951 SC 9, wherein it is held that where a party has to have recourse to the contract to establish his case, it is a dispute under the Contract Act as the question turned upon the true interpretation of the contract and the parties have to take recourse to the contract to establish the claim it was a dispute or arising out of the contract and thus within the jurisdiction of the arbitrators. It is further held that once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute.

8. Mr. Patel has further relied on the decision of Five Judge's Bench of the Hon'ble Supreme Court in the case of Konkan Railway Corporation Ltd & Another vs. Rani Construction Pvt.Ltd., AIR 2002 SC 778, wherein it is held that Section 16 of the Arbitration and Conciliation Act provides that the arbitral tribunal may rule on its jurisdiction. The arbitral tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal's authority under S. 16 is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction." On the basis of the aforesaid decision, Mr. Patel has strongly urged that the ld. trial Judge was not justified in rejecting the application moved by the petitioner for referring the matter to the arbitrator as the trial court has no jurisdiction to decide the issue raised in the suit by the respondent No.1. The question whether there is a valid agreement for arbitration or whether there is a clause in the contract with regard to the arbitration or whether a particular person is a party to the arbitration agreement or not can be raised and decided by the arbitrator in view of the provisions contained in Section 16 of the Act. The impugned order is therefore required to be quashed and

set aside and the stay granted by the trial court against further proceedings before the arbitrator is required to be vacated. Mr. Patel has further submitted that Clause 9 of the arbitration agreement read with letter dated 8th April 1987 written by the respondent No.3 to the petitioner and duly approved by the respondent No.1 clearly shows that there was valid agreement between the parties and the respondent No.1 was also a party to the said agreement. He has drawn the attention of the Court to Section 2(b) of the Act which defines "Arbitration Agreement" as an agreement referred to in Section 7 and Section 7(4)(b) stipulates that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of agreement. Mr. Patel has further relied on the decision of the Hon'ble Supreme Court in the case of Union of India vs. Rallia Ram - AIR 1963 SC 1685 wherein it is held that in order to constitute an arbitration agreement within the meaning of Section 2(a) of the Arbitration Act, there must be a valid agreement to submit present or future differences to arbitration and the agreement must be in writing and must be accepted by the parties. It is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor it is required to be signed by the parties.

9. Mr. MTM Hakim, ld. advocate appearing for the respondents, on the other hand, has strongly supported the order passed by the ld. trial Judge and submitted that it requires no interference by this Court while exercising its revisional jurisdiction under Sec. 115 of the Civil Procedure Code. Mr. Hakim has submitted that the present revision application is not maintainable as the suit is still pending before the trial court and whether the trial court has jurisdiction to decide the suit or not is a mixed question of fact and law, and by passing the impugned order the suit is not finally disposed and hence in view of the amendment made in Section 115 of the Civil Procedure Code the present Civil Revision Application is not maintainable. Mr. Hakim has further submitted that there was no valid arbitration agreement between the parties and the petitioner cannot invoke the arbitration clause contained in the agreement against the respondent No.1 as he is not a party to the said agreement and the agreement has not been signed by the party. He has further submitted that the respondent No.2 cannot act as an Arbitrator as he cannot be a judge in his own cause.

10. In support of his submissions, Mr. Hakim has relied on the decision of the Delhi High Court in the case of Shri Patanjal and another vs. M/s. Rawalpindi Theatres Private Ltd. - AIR 1970 Delhi 19, wherein it is held that "Only a person who is a party qua a contract can sue on it. The existence of statutory or equitable exceptions to this rule do not impinge upon its general fundamental character. Of course, if the subject-matter of the arbitration agreement is capable of assignment, then the assignee would step into the shoes of his assignor and be both bound by it and entitled to enforce it, but for this purpose, Court should look to the law relating to assignment of contractual rights and obligations and also to see whether in a given case, the assignee has exercised his right as such." It is further held that "The fact that a person claiming under a party to an agreement is empowered to move the judicial authority, does not establish that all outsiders can claim a right to enforce an arbitration agreement to which they are not parties under the law. It is only those persons who claim under a party to an arbitration agreement who should, in addition to the parties themselves, be held entitled to claim its benefit and also be held bound by the obligations imposed thereby." Mr. Hakim has further relied on the decision of the Delhi High Court in the case of M.M. Aqua Technologies Limited vs. Wig Brothers Builders and Engineers Ltd. and another - 2001(3) Arb.LR 301 (Delhi), wherein it is held that "to be a binding arbitration agreement between the parties, the same must be in writing and the parties should have specifically agreed to settle their disputes by arbitration. An arbitration agreement cannot be inferred by implication. As there is no agreement in writing between the petitioner and the second respondent, the clauses of the contract between the respondents, inter se will not in any way be binding on the petitioner. Mr. Hakim has further relied on the decision of the Hon'ble Supreme Court in the case of Wellington Associates Ltd. vs. Kirit Mehta - 2000 AIR Supreme Court Weekly 1165, wherein it is held that "Section 16 has conferred power on the arbitral Tribunal to decide whether there is in 'existence' an arbitration clause. But the language employed by S. 16 of the new Act shows that the said provision is only an enabling one which, unlike S. 33 in the old Act of 1940, now permits the arbitral Tribunal to decide a question relating to the 'existence' of the arbitration clause. Section 16 does not declare that except the arbitral Tribunal, none else can determine such a question. Merely because the new Act permits the arbitrator to decide this question, it does not necessarily follow that at the stage of S.

11 of the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause." It is further held therein that "The use of the word 'may' in S. 16 indicates that the arbitral Tribunal cannot be the only forum to decide about the "existence" of the arbitration clause. It is well settled that the source of the jurisdiction of the arbitrator is the arbitration clause. When that is the position, the arbitrator cannot, in all situations, be the sole authority to decide upon the "existence" of the arbitration clause. In cases where to start with -there is a dispute raised at the stage of the application under S. 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In such a situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by S. 16".

11. I have considered the arguments of the ld. advocates appearing on behalf of the respective parties and I have also gone through the order passed by the ld. trial Judge. I have further considered the authorities relied upon by both the sides in support of their respective contentions. I am of the view that the ld. trial Judge has committed a serious error in rejecting the application at Exh. 11 filed by the petitioner. The Civil Revision Application filed against the impugned order is maintainable despite the amended provisions contained in Section 115 of the Civil Procedure Code as the application at Exh. 11, if it is allowed, the suit would have come to an end. The subject matter of the suit is the proceedings before the Arbitrator and stay was prayed for against those proceedings. In view of the provision contained in Section 16 of the Arbitration and Conciliation Act, 1996, the said issue can be agitated before the Arbitrator and the Civil Court has no jurisdiction to decide the said issue. The true nature, scope and import of section as is succinctly explained by the Five Judges Bench of the Hon'ble Supreme Court in the case of M/s. Konkan Railway Corporation Ltd & Anr. vs. Rani Construction Pvt.Ltd., (Supra) to the effect that the arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction and hence there would be no impediment in raising the said dispute before the Arbitrator. The ld. trial Judge has also committed a very serious error in observing that the letter at Exh. 39/1 produced by the petitioner was not signed by the

respondent No.1. As a matter of fact, the respondent No.1 has duly approved the said letter. As observed by the Hon'ble Supreme Court in the case of Union of India vs. A.L. Rallia Ram (Supra), it is not always necessary that the arbitration agreement is required to be signed by the parties. Even as per the provisions contained in Section 7(4)(b) of the Act, an arbitration agreement can be considered to be in writing if it is contained in exchange of letters, telex, telegrams or other means of telecommunication which provide a record of agreement. Here, in the present case, the letter at Exh. 39/1 is in the form of exchange of letters and it is duly signed and/or approved by the respective parties. Hence, the existence of an arbitration agreement cannot be denied once if it is accepted by the parties that there is a valid agreement between the parties, the trial court is bound to take cognizance of that agreement. Once there is an arbitration agreement between the parties, the jurisdiction of the Civil Court is clearly barred under Section 8 of the Act. It states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if a party so applies not later than while submitting his first statement on the subsistence of dispute, refer the parties to arbitration. Here, in the present case, the petitioner has filed an application at Exh. 11 without submitting its statement on the subsistence of the dispute. The ld. trial Judge is therefore under an obligation to refer the matter to the Arbitrator. The issue involved in the present case is obviously an issue relating to question of law. No facts are required to be investigated and hence it is not proper to observe that it is a mixed question of law and facts and hence after recording the evidence the said issue can be decided. Taking overall view of the matter, and considering the relevant authorities on the subject, I am of the view that the suit, filed by the respondent No.1 before the trial court, is not competent and the learned trial Judge is not justified in rejecting the application at Exh. 11 moved by the present petitioner for dismissal of the suit as well as for vacating the interim relief granted against the arbitration proceedings. The impugned order is, therefore, quashed and set aside. The Civil Revision Application is allowed. Rule is made absolute with no order as to costs.

rmr. [K.A. Puj, J.]